

# ARKANSAS SUPREME COURT

No. CR 06-959

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered September 28, 2006

MICHAEL CAVE  
Petitioner

*PRO SE* MOTION FOR BELATED  
APPEAL OF JUDGMENT OF  
CONVICTION [CIRCUIT COURT OF  
GREENE COUNTY, CR 2004-315]

v.

STATE OF ARKANSAS  
Respondent

REMANDED

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## PER CURIAM

On November 29, 2005, judgment was entered reflecting that petitioner Michael Cave had entered a plea of guilty to a charge of battery in the first degree and misdemeanor driving while intoxicated for which the court imposed a sentence of sixty months' imprisonment, a fine of \$1,000, and 180 hours of community service. The court further suspended imposition of an additional sixty months' imprisonment. On August 29, 2006, petitioner filed the instant *pro se* motion in this court seeking leave to proceed with a belated appeal of the judgment.

Pursuant to Ark. R. App. P.--Crim. 1, there is ordinarily no right to appeal from a judgment entered on a plea of guilty. The exceptions are: a conditional plea of guilty premised on an appeal of the denial of a suppression motion pursuant to Ark. R. Crim. P. 24.3(b); when there is a challenge to testimony or evidence presented before a jury in a sentencing hearing separate from the plea itself; when the appeal is an appeal from a post-trial motion challenging the validity and legality of the sentence itself. *See Seibs v. State*, 357 Ark. 331, 166 S.W.3d 16 (2004); *see also Bradford v. State*,

351 Ark. 394, 94 S.W.3d 904 (2003).

The partial record lodged by petitioner with respect to his motion consists of the judgment of conviction and the circuit court docket sheet. The face of the judgment does not reflect that the plea fell within any of the recognized exceptions. The docket sheet, however, bears the notation, “[petitioner] appears with attorney...unconditional plea of guilty...*plea is a conditional plea pursuant to Rule 24.3 ARCrP w/ consent of prosecutor and defense.*” [Emphasis added.]

Generally speaking, a defendant waives his right to appeal when he pleads guilty. *Berry v. City of Fayetteville*, 354 Ark. 470, 125 S.W.3d 171 (2003); *Barnett v. State*, 336 Ark. 165, 984 S.W.2d 444 (1999). In the matter before us, it would appear that Rule 24.3(b) would provide the only procedure for an appeal from petitioner’s plea of guilty. Rule 24.3(b) provides:

With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress seized evidence or a custodial statement. If the defendant prevails on appeal, the defendant shall be allowed to withdraw the conditional plea.

By the terms of Rule 24.3(b), conditional pleas, and the accompanying right to appeal, are limited to an adverse determination on a pretrial motion to suppress. *Berry*, 354 Ark. 470, 125 S.W.3d 171. This court has interpreted Rule 24.3(b) as requiring strict compliance with the language that the right to appeal be reserved in writing; otherwise, the appellate court does not obtain jurisdiction. *Barnett*, 336 Ark. 165, 984 S.W.2d 444.

In the present case, it is not clear from the partial record that the requirements of Rule 24.3(b) have been met. There is no writing reflecting that petitioner was entering his guilty plea conditionally except for the contradictory entry on the docket sheet. Moreover, it cannot be

determined from the partial record that there is anything to appeal, as the record does not reflect that the trial court ever made an adverse ruling on a suppression motion or even that such a motion was ever filed.

This court addressed similar circumstances in *Smother's v. State*, 359 Ark. 412, \_\_\_ S.W.3d \_\_\_ (2004) (*per curiam*), wherein the petitioner sought to proceed with a belated appeal and it could not be determined from the record whether the plea was indeed a conditional plea. In *Smother's*, given the unusual posture of the motion and the fact that the record tendered in the case was incomplete, we remanded the matter to the trial court to settle the record and make findings of fact. The instant motion for belated appeal presents the same issues. Therefore, we remand the matter to the circuit court on the following issues: (1) whether there was a motion to suppress on which the trial court made an adverse ruling; (2) whether petitioner's guilty plea was entered conditionally pursuant to Rule 24.3(b); (3) whether, if the plea was a conditional plea, petitioner informed his counsel that he desired to appeal within the time allowed to file a notice of appeal

The court is granted sixty days from the date of this *per curiam* order to submit Findings of Fact on the issues presented. If a hearing is held on the issues presented, a transcript of that hearing should accompany the Findings when returned to this court.

Remanded.